

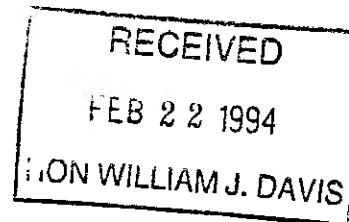
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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LANDMARK EDUCATION CORPORATION, :
Plaintiff, : Index No. 114814/93
-against- : I.A.S. Part 3
THE CONDE NAST PUBLICATIONS, INC., :
d/b/a SELF MAGAZINE, ADVANCE MAGAZINE :
PUBLISHERS, INC. d/b/a SELF MAGAZINE, :
and DIRK MATHISON, : Assigned to
Defendants. : Justice Davis)
-----X

CONFIDENTIAL

FIVE
JUL 7 1994
COUNTY
NEW YORK

REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT



Of counsel:

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and DIRK MATHISON, :
Defendants. :
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REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

Defendants The Conde Nast Publications, Inc., d/b/a Self Magazine, Advance Magazine Publishers, Inc. d/b/a Self Magazine, and Dirk Mathison (hereinafter "defendants") submit this reply memorandum of law in further support of their motion for summary judgment, pursuant to CPLR § 3212, dismissing the complaint in its entirety.

The relevant facts are set forth in the Affidavit of Robert M. Callagy, sworn to November 8, 1993 ("Callagy Aff."), and the Affidavit of Robert M. Callagy, sworn to February 17, 1994 ("Callagy Reply Aff."), both with exhibits annexed thereto, and will not be repeated herein.

PRELIMINARY STATEMENT

Despite plaintiff's sweeping generalizations about the alleged implications of the Article (only some of which are actually pleaded in the complaint), the five and one-half page Article makes just two limited references to The Forum, only one of

which is allegedly defamatory. That reference is found in the Sidebar -- a box five pages into the Article which lists nine groups that have been the subject of complaints for cult-like activities:

What makes a cult? The leading cult-awareness organizations cite the groups below -- which range from sleek and sophisticated "transformational workshops" to fundamentalist sects -- as having been the subject of complaints for activities that include: trance-induction; manipulative recruitment; thought reform or mind control; harassment of critics and their families and former followers; psychological and emotional damage; and fraud and deceit in fund-raising. The list was compiled from information provided by the American Family Foundation, the Commission on Cults and Missionaries and the Cult Awareness Network.

* * * *

* The Forum (also est and The Hunger Project): Founded by Werner Erhard. Personal growth, success and sometimes the salvation of the world. Celebrity member: John Denver.

Article, p. 155 (Callagy Aff., Exh. C) (emphasis added).

Plaintiff does not respond directly to the overwhelming evidence -- evidence produced by plaintiff itself -- establishing the truth of the statements complained of. Instead, plaintiff attempts to divert the Court's attention with irrelevant matters, devoting the vast bulk of its opposition papers to immaterial and extraneous issues.¹

¹ For example, plaintiff attacks the manner in which the Article was researched and prepared. Defendants firmly believe that their preparation of the Article will withstand scrutiny under any standard of care, but that is not relevant to this motion. See Memorandum of Law in Support of Defendants' Motion for Summary (continued...)

Moreover, in hopes of avoiding the dispositive arguments to which it has no response, plaintiff utterly mischaracterizes defendants' motion. First, defendants have established that the statements complained of are substantially true because (1) plaintiff cannot dispute that The Forum has been the subject of numerous complaints about many of the practices listed, and that these complaints have been made not only to leading cult awareness groups, but also in published reports, in legal actions, and in letters to plaintiff itself; and (2) plaintiff cannot dispute that these complaints are true (i.e., plaintiff does in fact engage in many of these practices, as established by plaintiff's own documents).² Second, defendants have established that many of the generalized statements complained of (including the word "cult") constitute non-actionable opinion. Finally, defendants have

¹(...continued)

Judgment ("Defendants' Memorandum"), p. 7 n. 5.

Furthermore, even if such issues were relevant, plaintiff's allegations are simply not true. For instance, plaintiff states that one of the individuals quoted in the Article, Dr. Margaret Thaler Singer, was, in fact, never interviewed. Affirmation of Debra E. Lans, dated January 18, 1994 ("Lans Aff."), ¶ 60. However, the document relied upon by plaintiff merely indicates that Joseph Amodio, the magazine's Research Chief, did not personally interview Dr. Singer. In fact, the documents produced by defendants to plaintiff include over 20 pages of notes taken by the author from his interview with Dr. Singer.

² Plaintiff mischaracterizes defendants' motion as arguing solely that The Forum has been the subject of at least one complaint to one organization about one cult-like practice. Plaintiff's Memorandum of Law, p. 4. In doing so, plaintiff completely ignores the bulk of defendants' motion, which sets forth ample evidence that 1) plaintiff has been the subject of numerous complaints to numerous organizations about numerous cult-like practices, as stated in the Article, and that 2) plaintiff's own documents establish the truth of these complaints.

established that most of the challenged statements are not "of and concerning" the plaintiff.³

DISCUSSION

POINT I

PLAINTIFF HAS NOT SET FORTH ANYTHING TO CONTRADICT THE SUBSTANTIAL EVIDENCE OF
THE TRUTH OF THE ARTICLE

The following facts established by defendants (primarily from plaintiff's own documents) have not been disputed by plaintiff:

- * leading cult awareness groups have received complaints about The Forum (see Defendants' Memorandum, p. 10);
- * plaintiff has received complaint letters charging The Forum with, e.g., psychological abuse, emotional confrontation and hyper-aggressive recruiting (see Defendants' Memorandum, pp. 10-14);
- * there have been numerous published complaints that The Forum engages in, e.g., "authoritarian indoctrination," "'cultlike' seminars" and "psychological brow-breathing" (see Defendants' Memorandum, pp. 15-18);
- * legal actions have alleged that The Forum is responsible for coercive and deceptive recruitment, psychological and emotional damage and "cult"-like behavior (see Defendants' Memorandum, pp. 18-20);
- * plaintiff instructs Forum personnel in manipulative and pressured recruitment (see Defendants' Memorandum, pp. 21-26);
- * plaintiff's documents reveal that The Forum engages in thought reform, mind control, and trance-induction (see Defendants' Memorandum, pp. 26-34);

³ Plaintiff mischaracterizes defendants' motion as arguing that none of the statements complained of are "of and concerning" plaintiff. Plaintiff then argues that readers interpreted the reference to The Forum as a reference to plaintiff -- which defendants do not at this point dispute. However, plaintiff does not address the fact that numerous statements in its complaint have nothing to do with plaintiff or The Forum.

- * plaintiff's documents admit that participation in The Forum may result in psychological and emotional damage (see Defendants' Memorandum, p. 34);
- * plaintiff's documents establish that The Forum engages in other practices -- such as the use of code-like jargon, strict control and hierarchical structure, exploitation of participants' insecurity and feelings of alienation, and adherence to the teachings of an authoritarian leader (Werner Erhard) -- that are typically associated with cults (see Defendants' Memorandum, pp. 35-37).

Because defendants have submitted overwhelming evidence of the truth of the statements complained of, plaintiff bears the burden of coming forward with sufficient evidence from which a jury could conclude, by clear and convincing evidence, that the Article is false. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986); Celotex Corporation v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986).⁴ A party opposing summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts;" speculation, conclusory allegations and mere denials are not enough to raise genuine issues of fact.

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986). Plaintiff has not come close to meeting its burden.

⁴ Although plaintiff claims that it does not have to establish falsity by clear and convincing evidence (Plaintiff's Memorandum of Law, pp. 35-37), "the better view holds that the plaintiff must come forward with clear and convincing proof of falsity rather than a mere preponderance." Sanford, Libel and Privacy, § 6.4 (2d Ed. 1993) (and cases cited therein).

A. THERE CAN BE NO GENUINE DISPUTE THAT THE FORUM HAS BEEN THE SUBJECT OF NUMEROUS COMPLAINTS ABOUT ITS CULT-LIKE PRACTICES

1. Leading Cult Awareness Organizations Have Received Complaints About The Forum

In their moving papers, defendants set forth evidence establishing that leading cult awareness organizations, such as the Cult Awareness Network and The American Family Foundation, have received numerous complaints about The Forum's cult-like practices. See Callagy Aff., Exh.'s. I, K, L, M; Defendants' Memorandum, p. 10.⁵ Plaintiff has not come forward with anything to refute this evidence. Thus, there can be no genuine dispute that The Forum has been the subject of complaints to cult awareness organizations.

⁵ Plaintiff does devote a substantial amount of space to attacking the credibility of several of these groups, including the Cult Awareness Network ("CAN"), and its leader, Cynthia Kissner. See Lans Aff., ¶¶ 55-60, Exh.'s. 6-7. However, while this group may be controversial, the materials submitted by plaintiff overwhelmingly establish that CAN is in fact a leading cult awareness group.

2. Plaintiff Has Received Complaints that The Forum Has Engaged in Many of the Practices Detailed in the Sidebar and the Article⁶

Plaintiff's own documents make clear that Landmark has received numerous complaints that The Forum engages in many of the practices referred to in the Sidebar. See Callagy Aff., Exh. N; Defendant's Memorandum, pp. 10-14. Plaintiff does not -- and cannot -- dispute this fact.⁷

3. Complaints About The Forum and its Cult-Like Practices Have Been Widely Reported in the National and International Press

Defendants have come forward with numerous news reports published prior to the Article that detail the cult-like practices

⁶ Plaintiff argues that the letters and news reports referred to herein and in Point I(A)(3), infra, are inadmissible hearsay. However, these documents are submitted to establish that numerous complaints have been made, not to show the truth of those complaints. Thus, the statements are not hearsay and are admissible. See, e.g., McCormick on Evidence, § 249 (4th Ed. 1992) ("[i]f the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay").

The truth of the complaints is established through plaintiff's own training manuals and course materials. See Point I(B), infra; Defendant's Memorandum, pp. 20-37. While plaintiff now makes a half-hearted attempt to disclaim its own documents (see Lans Aff., ¶ 32 n. 3), plaintiff has not come forward with any evidence to support its disavowal.

⁷ Plaintiff has come forward with affidavits and letters from individuals who assert that they have benefitted from The Forum, or who do not view it as a cult. However, the fact that plaintiff has been able to locate some people who are willing to say that they enjoyed The Forum misses the point. That some people think The Forum is a positive program does not in any way change the truth of the statements in the Article. It remains beyond dispute, no matter what plaintiff's supporters say, that a substantial number of people have complained about The Forum to the plaintiff, to cult awareness groups, to the media, and to the courts, and that plaintiff's documents support the truth of these complaints. At best, these affidavits and letters support defendants' argument that whether The Forum is a "cult" is a matter of opinion. See Point II, infra; Defendants' Memorandum, pp. 37-43.

of The Forum. See Callagy Aff., Exh.'s I, J, K, M; Defendant's Memorandum, pp. 15-18. Plaintiff has not and cannot dispute such a published record.

For example, Outrageous Betrayal: The Dark Journey of Werner Erhard from est to Exile (a full-length book published by St. Martin's Press in the fall of 1993) includes detailed accounts of plaintiff's confrontation-based practices, emotional damage suffered by Forum participants and complaints brought against The Forum.⁸ Moreover, the book's description of one of plaintiff's spring 1992 Forum sessions demonstrates the way in which Landmark deliberately dissociates The Forum from Werner Erhard and est, while maintaining most if not all of Erhard's cult-like practices:

Erhard himself was only a ghost, now that he no longer officially had anything to do with The Forum, his successor to est now offered by Landmark Education Corporation. . . . But the words and phrases bore his unmistakable

⁸ Until now, defendants have limited their documentation to materials prepared prior to publication, because substantial truth is measured at the time of publication. However, plaintiff has relied on letters and news reports written after the Article was published in support of its claim of falsity. In order to provide the Court with a balanced perspective of recent reports about The Forum, defendants now submit relevant portions of Mr. Pressman's recent book, as well as a sample of published news reports detailing The Forum's cult-like practices, many of which explicitly refer to The Forum as a cult. See Goudreau, "Funny Things Happen On the Way Through The Forum," Metroland, 3/18-24/93 (addressing the issue of whether The Forum is a "cult"); Siegel, "HP Board considers 'cult' training," Highland Park Journal, 4/18/93 ("critics warn [The Forum] is like a cult that destroys people's identity through mind control techniques and psychological manipulation, . . . and can result in pyschological damage"); Henry, "Secret to Happiness," Miami Herald, 7/18/93 ("Or maybe, its just The Forum that's dangerous"); Feinstein, "A strange and terrible journey," The Ethnic Newswatch, 10/15/93. Copies of these articles are annexed to the Callagy Reply Aff. as Exh. B.

imprint, for they had hardly changed from the days when Erhard was in control.

* * *

For the next three days, [Forum Leader] Laurel Scheaf treated the 150 transformation seekers to a steady dose of mystifying phrases and head scratching mental exercises that had the participants tied up in knots as they made valiant efforts to attach even a shred of logical meaning to the strange language and bizarre goings-on in the room.

* * *

When leading The Forum, Laurel Scheaf managed whenever she could to drop est from the disappearing past. . . . Now, in the aftermath of Erhard's fall from grace, she simply switched course names

* * *

[O]n this night and other nights to come, it was up to Laurel Scheaf and a few dozen other disciples of Werner Erhard who led The Forum to accept the applause they really knew belonged to him. They would continue to serve him as they always had -- by imitating him, copying his gestures and his style, subtly planting in the mind of each new customer a rationale for the dark acts that Werner Erhard had been so publicly accused of.

Id. at 263-75. Relevant portions of 'Outrageous Betrayal' are annexed to the Callagy Reply Aff. as Exh. A.

4. The Forum Has Been the Subject of Legal Complaints Alleging Cult-like Practices and Psychological Damage

It is a matter of public record that The Forum has been the subject of legal claims alleging that it engages in coercive and deceptive recruitment, inflicts psychological and emotional damage, and is a "cult." While plaintiff denies that it (i.e., Landmark Education Corporation) has ever been a defendant in such

an action, or been charged by a governmental entity, this argument is disingenuous and misleading. Plaintiff's Memorandum of Law, p. 6.

For example, there can be no dispute that Ney v. Erhard et al. (E.D. Va. 1991), was an action against Werner Erhard, Werner Erhard and Associates, and Landmark, by a Forum participant who claimed psychological and physical abuse. See Callagy Aff., Exh. O; Defendants' Memorandum, pp.18-19. There is also no dispute that Landmark obtained a verdict solely on the ground that Ney had not established successor liability, because Ney's attendance at The Forum predated Landmark's purchase of The Forum. However, it is not true that "Landmark has never been sued," as asserted by plaintiff. Lans Aff., ¶ 29; Schreiber Aff., ¶ 21. Moreover, there can be no dispute that The Forum -- the entity actually mentioned in the Article -- has been charged with inflicting psychological and physical abuse.⁹

⁹ Plaintiff selectively chooses when it wants to associate itself with The Forum, and when it does not. Because the Article makes no mention whatsoever of Landmark, for purposes of its "of and concerning" argument, plaintiff argues that a reference to The Forum necessarily implicates Landmark. However, plaintiff then attempts to distance itself from the overwhelming evidence of substantial truth, by arguing that some of the supporting documentation relates to the period before plaintiff purchased The Forum. Plaintiff cannot have it both ways.

Moreover, the fact that The Forum was purchased by Landmark in 1991 does not abrogate the First Amendment right of the press to report on the recent history of The Forum, particularly where there is no evidence whatsoever that the change in ownership resulted in substantial changes in the ideology and practices associated with The Forum. If Landmark chooses to adopt The Forum's reputation as its own, it must adopt that reputation in its entirety.

Second, there is no dispute that the ACLU did, in fact, file Equal Employment Opportunity Commission charges in connection with an employer's alleged mandate that his workers participate in The Forum. Plaintiff's only response to this is that the charges were not brought against Landmark or The Forum. However, defendants have never argued that the charges were brought against The Forum or plaintiff (and indeed explicitly stated that the charges were against the employer). Instead, the (now undisputed) point is that the ACLU charged that the employees "were fired or forced to resign because they refused to participate in The Forum, a program they describe as a 'religious cult.'" See Callagy Aff., Exh. O; Defendants' Memorandum, pp. 19-20.

Finally, plaintiff does not even address the evidence submitted by defendants that an Israeli government commission has included The Forum in a 500-page report on spiritual groups employing unethical and damaging practices. See Callagy Aff., Exh. I; Defendants' Memorandum, p. 17.

B. THERE CAN BE NO GENUINE DISPUTE THAT THE FORUM HAS ENGAGED IN MANY OF THE TACTICS LISTED IN THE SIDEBAR

Contrary to plaintiff's characterization of defendants' motion, defendants have submitted overwhelming evidence -- based solely on documents produced by plaintiff itself -- that The Forum in fact employs many of the practices identified in the Article as characteristic of cults.

1. Manipulative and Coercive Pressure in Recruitment

Plaintiff cannot dispute that The Forum Supervisors Manual (produced by plaintiff) is replete with indications of the

extraordinary emphasis plaintiff places on enrollment in and completion of The Forum. The repeated references in the manual to high-pressured tactics speak for themselves, and plaintiff's efforts to explain them away are simply unconvincing. See Callagy Aff., Exh. P (A093-94, 096, 109-110, 116-17, 131, 149-150, 155, 178-179, 181, 191), Q (A453, 456, 470-563), S (A284), T (A067, 072); Defendants' Memorandum, pp. 21-26.

2. Thought Reform, Mind Control and Trance Induction

There can be no dispute the rigorous schedule imposed by The Forum strictly limits the amount of food and sleep participants may enjoy during the program. See Callagy Aff., Exh.'s P (A154, 157, 168-169, 204), R (A003); Defendants' Memorandum, pp. 28-29. Moreover, plaintiff's manuals indicate in no uncertain terms the manner in which participants are gradually isolated from family and friends and pressured to suppress any criticism of The Forum. See Callagy Aff., Exh.'s P(A086-087, 089, 091-093, 095-096, 136-137, 139, 147, 156-170, 189, 207), R (A005), S (A283), T (A028, 061); Defendant's Memorandum, pp. 26-34.¹⁰

3. Psychological and Emotional Damage

Plaintiff cannot dispute the explicit warnings in its own publications about the risk to participants of psychological and emotional damage. Because the warnings highlight the intensity and

¹⁰ As one of plaintiff's supporters, Edward Lowell, points out, "'brainwashing' techniques . . . necessarily involve the intrusive inculcating of a particular ideation or creation or doctrine and the disenchantment of a subject with his previous affiliations, loyalties, support groups and principles." Lowell Aff. ¶ 5. That is exactly what takes place in The Forum.

extreme personal risks associated with The Forum, they support a number of the challenged statements from the Article. See Callagy Aff., Exh. R (A008-009); Defendant's Memorandum, p. 34.

4. Others of Plaintiff's Practices Set Forth in Documents Produced by Plaintiff Are Also Characteristic of Cults

Plaintiff cannot dispute that its documents also reveal other practices typically associated with cult-like behavior: (1) The Forum has developed a code-like jargon unique to followers within the organization; (2) Forum personnel are trained to exploit participants' feelings of insecurity and alienation; and (3) The Forum has a rigid organizational hierarchy and maintains strict control. See Callagy Aff., Exh. P (A087-088, 093-095, 113, 127, 129-134); Defendants' Memorandum, pp. 35-37.

Moreover, plaintiff admits (as it must) that The Forum is based entirely on the teachings of Werner Erhard, a recognized "cult" figure. Affidavit of Arthur Schreiber, sworn to January 14, 1994 ("Schreiber Aff."), ¶¶ 7-9. See also Callagy Aff., Exh.'s E-H; Defendants' Memorandum, pp. 2-3 n.3.¹¹

¹¹ Plaintiff submits the affidavit of Lowell Streiker, sworn to January 6, 1994 ("Streiker Aff."), a supposed expert on cults, who sweepingly claims that The Forum is not a cult. In fact, however, Mr. Streiker's definition of "cult" supports defendants' claims. Streiker Aff., ¶ 4. For example, Mr. Streiker asserts that "cults" are "nontraditional groups based upon the teaching of an authoritarian leader." There can be no question that Mr. Erhard qualifies as a nontraditional, controversial, "authoritarian" leader. See Pressman, Outrageous Betrayal: The Dark Journey of Werner Erhard from est to Exile (describing his "authoritarian regime" on pp. 15, 63-66, 85-86, 88, 123-24, 128-29, 160, 175-76, 188-89, 232) (Supp. Callagy Aff., Exh. A); MacNamara, "The Return of Werner Erhard: Guru II," Los Angeles Magazine, May 1988 (Callagy Aff., Exh. I).

Rather than address head-on the evidence of substantial truth, plaintiff sweepingly states that the proof offered by defendants is not as broad as the statements in the Article. However, plaintiff does not identify a single statement in the Article which is not more than adequately supported by defendants' moving papers.

Furthermore, the cases relied upon by plaintiff are inapposite. In Crane v. New York World Telegram Corp., 308 N.Y. 470, 126 N.E.2d 753 (1955), plaintiff brought a defamation action based on a news report that he was "now under indictment." In fact, plaintiff was never indicted by a grand jury, and defendants relied solely upon the fact that plaintiff had been accused of crimes by fellow workers. While the court did rule in favor of the plaintiff, it specifically stated that a better-substantiated defense would have changed the outcome of the case:

In the case before us, . . . the facts alleged are entirely unrelated to the truth of the charge that plaintiff had been indicted . . . [However, the] situation might be different had defendants acknowledged that they had charged plaintiff with having been indicted and then proceeded to claim that they believed that to be true because plaintiff had been before the grand jury and had testified to his commission of crime.

Id. at 477 (emphasis added).

Similarly, in Malone v. Longo, 463 F. Supp. 139 (E.D.N.Y. 1979) (nurse stated that plaintiff "told [her] to give a medication that [plaintiff] did not have an order for and insisted on giving [her] that order"), is based on facts wholly dissimilar to the ones here. In Malone, the trial court did not apply the truth defense

to dismiss the action because the statement complained of was capable of multiple interpretations and thus could not be proven. Here, defendants have established the truth of the Article, under any interpretation.

Accordingly, because there can be no genuine dispute that the statements complained of are substantially true, defendants are entitled to summary judgment dismissing the complaint in its entirety.

POINT II

THE STATEMENTS COMPLAINED OF QUALIFY AS CONSTITUTIONALLY PROTECTED OPINION

Notwithstanding plaintiff's misstatement of the applicable law,¹² the mere inclusion of The Forum in its Article on "white collar cults" is protected opinion, because the term "cult" is incapable of being proven true or false. Similarly, no reasonable reader would understand most of the generalized statements throughout the Article as anything but non-verifiable opinion, and thus, they, too, are nonactionable.

Plaintiff's arguments reflect a constricted and inaccurate view of the protection afforded freedom of expression in

¹² In particular, plaintiff's bold-faced misstatement of the federal law regarding protection of opinion ("The United States Constitution Does Not Afford First Amendment Protection to Expressions of Opinion") (Plaintiff's Memorandum of Law at 37) is eye-catching. As one treatise notes, "[i]t is important to be extremely careful in judging exactly what Milkovich did and did not hold Milkovich did not eliminate first amendment protection for 'opinion.' Rather, the Court chose to articulate the constitutional rules in terms of the requirement that state defamation actions be based upon statements of fact provable as false." Smolla, Law of Defamation § 6.02[1].

New York.¹³ In fact, both the First Amendment and the New York State Constitution offer broad protection for criticism and opinion concerning groups such as The Forum -- which many people find harmful -- in order to create sufficient breathing space for sometimes caustic free expression. Indeed, the New York Court of Appeals recently reaffirmed its commitment to maintaining broad protection for this very kind of speech:

The Supreme Court has . . . recognized that 'a statement of opinion relating to matters of public concern that does not contain a provably false factual connotation will receive full constitutional protection.' Further, this Court has adopted a similar view under our own State Constitution and has embraced a test for determining what constitutes a nonactionable statement of opinion that is more flexible and is decidedly more protective of 'the cherished constitutional guarantee of free speech.'

¹³ The remarks of Father Edward Zogby, a Forum participant and administrator at Fordham University, are a perfect example of plaintiff's cramped reading of the First Amendment. Father Zogby expresses surprise that The Forum should be exposed to critical commentary:

Indeed, as a professional educator, I am struck by the thought that if Landmark's educational program can be criticized in these ways, then so too may the education at Fordham and any other major universities . . .

Affidavit of Edward Zogby, sworn to December 21, 1993 ("Zogby Aff."), ¶ 15. This is, of course, precisely the point. The First Amendment and New York State's Constitution protect such open and frank discussion -- no matter how critical -- of universities, religious groups, military organizations, professional associations and self-help groups such as The Forum. For example, an article criticizing the Socratic method of legal education taught at Fordham or any other law school as "mind control," "thought reform" or creating a "cult" of lawyers, would not be actionable. See also Affidavit of Steven Zaffron, sworn to January 6, 1994 ("Zaffron Aff."), ¶ 7.

Gross v. New York Times, 82 N.Y.2d 146, 152, 603 N.Y.S.2d 813, 817 (1993).¹⁴

Even if true, the conclusions in plaintiff's affidavits do no more than confirm defendants' basic point about the term "cult" -- reasonable minds differ as to which groups are "cults" and which are not. Such conflicting views make clear that one person's self-help group is another's "cult," just as one person's "religion" is another's "opium of the people."¹⁵ Plaintiff has not come forward with a universally-accepted definition of "cult," nor has plaintiff contradicted defendants' evidence that the meaning and characteristics associated with the term vary enormously from individual to individual. See Callagy Aff., Exh. U.¹⁶ This is

¹⁴ In Gross, the court concluded that plaintiff's 59-page complaint citing an entire series of newspaper articles should not have been dismissed by the trial court, since, upon examination, it was clear that the series did include assertions of fact, in addition to the many opinions and conclusions.

¹⁵ Karl Marx, Critique of Hegelian Philosophy of Right (1844).

¹⁶ Plaintiff's attempt to argue that the Article provides such a definition is dependent upon liberal editing and rephrasing of key quotations.

For example, the "quote" from the Article that appears at Plaintiff's Memorandum of Law, p. 2 n. 1, is misleading. While the Article does ask the rhetorical question "What makes a cult?", the Article specifically sets forth different definitions used by different people and groups. Pulling out one such definition, plaintiff excises the language attributing the following answer to Marcia Rudin, director of the International Cult Education Program, as well as her quoted remark, "For our purposes, we define it as . . ." Plaintiff then uses ellipses to link Rudin's definition of "cult" to language that appears 19 paragraphs (two full pages) later in the Article. Thus, while the linked language represents utterly distinct conclusions by different individuals, plaintiff's quote falsely presents it as one unified statement. See Article, pp. 121-123, Callagy Aff., Exh. C.

(continued...)

because labels like "cult" -- especially when attributable to specific individuals and groups -- are personal beliefs that cannot be substantiated by positive proof.

Furthermore, the other generalized statements identified by plaintiff as allegedly defamatory -- such as "thought reform," "mind control" and "brainwashing" -- are broad, undifferentiated conclusions that in no way can be verified objectively. See Callagy Aff., Exh. A (Plaintiff's Complaint), ¶¶ 18-19. Plaintiff itself promises Forum participants that they will "break through the confines of even the best of conventional modes of thinking." (Callagy Aff., Exh. R, A 005). Whether such "breaking through" is equivalent to positive transformation or dangerous "thought reform" is a matter of opinion. Similarly, the statement that participants have "surrendered their psyches," cannot, as a matter of law, be classified as an assertion of fact, because plaintiff will not be able to prove its falsity (i.e. that participants have not surrendered their psyches) or even its meaning (i.e. what "surrender[ing]" one's psyche means).

Plaintiff makes no effort to distinguish the cases cited by defendants in which similar statements about supposedly cult-like groups were held to be nonactionable opinion. See, e.g., Holy Spirit Ass'n of the Unification for World Christianity v. Sequoia Elsevier Publishing Co., 75 A.D.2d 523, 426 N.Y.S.2d 759 (1st Dep't

¹⁶(...continued)

Moreover, the inclusion in the five and one-half page Article of one individual's definition of "cult" does not transform the term from unverifiable opinion into objectively provable fact.

1980) (affirming grant of summary judgment to defendants on ground that referring to the Unification Church as a "cult" was protected opinion); Church of Scientology v. Cazares, 638 F.2d 1272 (5th Cir. 1981) (statements that Scientology was a "gung ho" "paramilitary organization" held to be nonactionable opinion).

In addition, plaintiff's treatment of Cera v. Mulligan, 79 Misc. 2d 400, 358 N.Y.S.2d 642 (Sup. Ct. 1974), another case in which the term "cult" was held to be nonactionable opinion, is totally unpersuasive. In that case, a group of chiropractors sued a newspaper because of a letter to the editor entitled "Dangerous Cult Given TV Time." This action is no different from Cera, since here, too, defendants "did no more than espouse an opinion" about plaintiff, a controversial group. Id. at 406, 358 N.Y.S.2d at 649.

Finally, plaintiff relies on New Testament Missionary Fellowship v. E.P. Dutton & Co., Inc., 112 A.D.2d 55, 491 N.Y.S.2d 626 (1st Dep't 1985) for the proposition that terms such as "brainwashing" are actionable statements of fact. However, New Testament involved a full-length book on "deprogramming," which included several complete chapters about the plaintiff with detailed factual claims about its practices. Because the book was replete with such data, the court found many of the statements to be actionable. Nevertheless, the Court still held the label "spiritual fascists" to be protected opinion. In contrast, in this case there are just two passing references to The Forum (only one of which is allegedly defamatory), and no specific factual allegations about The Forum.

Thus, because the statements alleged to be defamatory qualify as protected opinion, defendants are entitled to summary judgment dismissing plaintiff's claim for defamation.

POINT III

MANY OF THE STATEMENTS COMPLAINED OF
ARE NOT "OF AND CONCERNING" PLAINTIFF

Contrary to plaintiff's claims, defendants do not contend that none of the statements in the Article are "of and concerning" plaintiff. Rather, defendants' point is that "because many of the statements complained of are not 'of and concerning' plaintiff, defendants are entitled to summary judgment dismissing plaintiff's claims with respect to those statements." Defendants' Memorandum, p. 47 (emphasis added).¹⁷

Specifically, defendants have clearly demonstrated in their moving papers: a) that plaintiff engages in most of the activities referred to in the Article, and b) that as to any other activities, the references in the Article are simply not 'of and concerning' Landmark or The Forum. In doing so, defendants have addressed each particular statement set forth in the complaint. On the other hand, plaintiff has come back attacking the general

¹⁷ Plaintiff contends it is "audacious" to believe that general statements, which clearly apply to some, but not all, of the groups mentioned, are not "of and concerning" the plaintiff. Plaintiff's Memorandum of Law, p. 47. However, what truly is bold is plaintiff's suggestion that reasonable readers could conclude that every single statement in the Article -- and every single statement in the Sidebar -- applies to every single group referred to anywhere within the Article or the Sidebar. As set forth fully in defendants' moving papers (Defendants' Memorandum, pp. 43-47), as a matter of law and common sense, most of the challenged statements are not susceptible of application to plaintiff or The Forum.

"tenor" of the Article (Plaintiff's Memorandum of Law, p. 47), in disregard of the requirement that the particular words complained of in a libel action be treated with specificity. See CPLR § 3016(a).

The undisputed fact is that the Article never mentions plaintiff and makes just two passing references to The Forum, only one of which is allegedly defamatory (the inclusion of The Forum in the Sidebar).

For example, plaintiff's claim that the Article implies it operates a "pyramid marketing scheme" fails the moment the statement is examined in context. The phrase appears as part of a general description of groups "throughout history" and "in every society" and is located nowhere near either of the references to The Forum. Similarly, the statements "uses coercive pressure and deception to get people to join in" and "uses mind-manipulation techniques without the consent or knowledge of the participants" appear as part of a general definition of "cult" offered by one individual for her own purposes, and clearly do not refer to plaintiff, to The Forum, or to any specific group at all.

Furthermore, plaintiff has not been able to show that any one of the specific practices listed in the Sidebar were meant to apply to The Forum. The explicit language of the Sidebar makes clear why:

What makes a cult? The leading cult-awareness organizations cite the groups below ... as having been the subject of complaints for activities that include:

Callagy Aff., Exh. C (emphasis added). Since the unambiguous meaning of the Sidebar is that each group listed has been the subject of complaints about some, but not all, of the tactics described, no reasonable reader could conclude that each group has been the subject of complaints about each tactic listed. Whether read alone or in conjunction with the rest of the Article, the Sidebar cannot support a finding that any one of the listed activities relates to plaintiff or to any other particular group.

Plaintiff's effort to distinguish Cohn v. Brecher, 20 Misc. 2d 329, 192 N.Y.S.2d 877 (Sup. Ct. 1959), is unpersuasive. The rule cited by plaintiff, that "if defamatory language is used [as] to an entire group, including every one of them, it may be said to refer to each member of the group, so that each may sue," is just as inapposite here as it was held to be in Cohn. 192 N.Y.S.2d at 878. Here, as in Cohn, each particular statement complained of refers to at least one, but clearly not each, of the subjects in question. Thus, the court's conclusion is precisely on point:

From a reading or hearing of the words noted here, one cannot conclude that they were directed to plaintiff alone or to him as one of a group of persons.

* * *

[Since] there is nothing to show which one was meant, no one can sue.

Id. at 878-9.¹⁸

¹⁸ Plaintiff's attempt to finesse the "of and concerning" issue by portraying the Article as an example of group defamation is equally unpersuasive. First, the group defamation doctrine is disfavored by New York courts. See, e.g., Brady v. Ottaway (continued...)

Finally, plaintiff mis-cites Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980), for the false proposition that whether a statement is "of and concerning" the plaintiff is an issue of fact for the jury. In Geisler, the plaintiff challenged the publication of a supposedly fictional book in which the protagonist, a female transsexual tennis player, bore plaintiff's name, Melanie Geisler. Because the plaintiff neglected to specifically allege that the references were "of and concerning" her, the trial court dismissed the suit on the pleadings. The Second Circuit reversed the dismissal based solely on the pleading defect, but specifically noted that the "of and concerning" question might later be amenable to summary judgment:

Without speculating whether plaintiff will, after responsive pleadings and appropriate discovery, develop adequate evidence to allow the case to be submitted to the trier of fact, or even to withstand a motion for summary judgment, we reverse and remand. The dismissal of this action at the pleading stage improperly denied appellant the opportunity to adduce a full record on the "of and concerning" element of her claims.

¹⁸(...continued)

Newspapers, Inc., 84 A.D.2d 226, 445 N.Y.S.2d 786 (2d Dep't 1981).

Second, the group defamation doctrine is only relevant when an individual is not personally identified, but is recognizable as a member of a limited group that is specifically identified, and the statements complained of are directed to all members of the group. Smolla, Law of Defamation § 4.10[5]. The doctrine has no application to statements that do not apply specifically to any individual or group, or to statements that do not apply to all members of that group.

In any event, with respect to many of the statements complained of, plaintiff has yet to establish "that 'the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to [it].'" Church of Scientology v. Time Warner, Inc., 806 F. Supp. 1157 (S.D.N.Y. 1992) (quoting Restatement (Second) of Torts, § 564A(b) (1977)).

Id. at 637-38 (emphasis added).

In fact, New York courts have repeatedly held as a matter of law that allegedly defamatory^{*} statements are not "of and concerning" the plaintiff. Carlucci v. Poughkeepsie Newspapers, 57 N.Y.2d 883, 456 N.Y.S.2d 44 (1982) ("The reading public . . . could not take the article, which never mentioned the [plaintiff] . . . as 'of and concerning' the [plaintiff]"); Howard v. Buffalo Evening News, Inc., 89 A.D.2d 793, 453 N.Y.S.2d 516 (4th Dep't 1982) ("[w]e agree with the trial justice that, as a matter of law, the alleged defamatory statement . . . was not of and concerning the plaintiff"); Springer v. Viking Press, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1st Dep't), aff'd, 60 N.Y.2d 916, 470 N.Y.S.2d 579 (1983) ("[w]e agree with the Appellate Division that whether the complaint sufficiently alleges that [the book] . . . refers to plaintiff is a matter for the court") (affirming dismissal of complaint).

Because many of the statements complained of are clearly not "of and concerning" plaintiff, defendants are entitled to summary judgment dismissing plaintiff's claims with respect to those statements.

CONCLUSION

Plaintiff has failed to show any triable issues of fact. Accordingly, defendants respectfully request an order granting their motion for summary judgment and dismissing the complaint in

its entirety, and granting defendants such other and further relief as the Court deems appropriate.

Dated: New York, New York
February 17, 1994

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

The undersigned, being duly sworn, deposes and says:

1. I am not a party to this action, am over 18 years of age and reside at 1903 STRAUSS ST Brooklyn NY 11212.
2. That on February 17, 1994, deponent personally served a true copy of the annexed Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment upon:

Arlene R. Smoler, Esq.
Morrison Cohen Singer & Weinstein
750 Lexington Avenue
New York, New York 10022

by delivering same to receptionist.

Wayne Mates

Sworn to before me this
17th day of February, 1994.

COLEEN M. McGRATH
Notary Public

COLEEN M. McGRATH
Notary Public, State of New York
No. 01MC5014267
Qualified in New York County
Commission Expires July 15, 1995